THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

CIVIL SUITS NO 61 OF 2002 AND NO. 295 OF 2002.

MARIA NAKIMERA NASSANGA………………………PLANTIFF

VS

1.TEDDY NAKAWESA]
2. HARRIET NAGUJJA]
3. H. KAKEMBO]
4. MRS. KIBALIZI::DEFENDANTS

BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)

JUDGMENT

Introduction.

The plaintiff, Maria Nakimera, is an elderly lady. She testified that she was 80 years old. She filed two suits in this honourable court. They are civil suit No 61 of 2002 and civil suit No. 295 of 2002. In civil suit No.61 of 2002, the plaintiff sued the two first defendants jointly. The last two defendants were also sued jointly in civil suit No.295 of 2002. By order made by this court on I 3 June, 2002, the two suits were consolidated since they related to the same subject matter and arose out of the same transaction.

Plaintiff's case.
In brief, the plaintiff's case is that she claims to be the owner of a kibanja at Busega, Kibumbiro zone A, within the city of Kampala. She claims to have held the kibanja for well

over 50 years having obtained it from her father, the late Tanansi Balizakiwa. She alleges that the four defendants trespassed upon her kibanja on 20th December, 2001 and demolished her three houses which were on her kibanja. The plaintiff also alleges that in the process of demolishing the three houses, the defendants also destroyed her household properties.

The plaintiff seeks an order declaring her rightful owner of a kibanja on the suit property. She seeks an order awarding her general damages for trespass against the first and second defendants. She also seeks an order against all the four defendants for compensation for the three houses and household properties alleged to have been destroyed by them. Finally, the plaintiff seeks an order awarding her the costs of this suit.

Defendants'case.

The first and second defendants filed a joint defence. The two claim that they are the administrators of the estate of their father, the late Leo Kigozi Ssemwanga. They claimed that the suit property was registered in their names as administrators of the estate of their father. Leo Ssemwanga Kigozi inherited the land from his father, the late Tanansi Balizakiwa who was also the father of the plaintiff. They denied that the plaintiff, who is their paternal aunt, had any kibanja or any other interest in the suit property. According to both defendants, the plaintiff was allowed to stay upon the suit property merely as a caretaker owing to the fact that the beneficiaries of the suit property were still young. The two defendants denied that there was any destruction of property belonging to the plaintiff. In the alternative, the two first defendants averred that if any destruction of property ever took place, then it was in execution of an eviction order issued by the LCI court of Kibumbiro zone A, Busega village. Lastly, the first and second defendants contended that the plaintiff's case against them was barred by the doctrine of res Judicata. They pray that the plaint be rejected or struck off the register.

In their defence the third and fourth defendants denied all the allegations made against them. They both specifically denied that they carried out any demolition of any houses and that they destroyed any household properties, belonging to the plaintiff, as was alleged in the plaint.

Issues.

The issues for determination as agreed upon by the parties are:

a) Whether the suit against the first and second defendants is res iudicata

b) Whether the plaintiff has any kibanja (customary tenancy) interest in the suit property or whether she is a mere caretaker;

C).. Whether any of the defendants trespassed upon the plaintiffs kibanja;-.

d) Whether the plaintiff suffered any loss or damage.

e) Whether the plaintiff is entitled to the remedies she seeks.

Evidential Analysis.

I will relate and analyse the evidence in respect of each issue individually.

Res judicata.

Learned counsel Mr. Urban Tibamanya had sought to raise this issue as a preliminary objection. The court urged him to flame it as one of the issues owing to the fact that its disposition would itself call for evidence. The question is whether the case is, in relation to the first and the second defendants, barred by the doctrine of res judicata.

The law governing the application of the doctrine of res iudicata is found in section seven of the Civil Procedure Act, Cap. 65. The provision reads:

"7. No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard finally and decided by such court."

The argument raised, by Mr. Tibamanya, on behalf of the first and second defendant is that the LCI court of Kibumbiro zone A, Busega village, did determine the issues of ownership of the suit property as well as the issue of trespass. A certified copy of the judgment of that court was annexed to the defence of the first and second defendants and it was admitted into evidence as exhibit 03. The case in the LCI court of Busega was designated as Civil Suit No. 013 of 2000, decided on 24.12.2000. The case was heard and determined ex-parte because the court noted that when summons were served upon the plaintiff, she rejected them and did not appear before the court on the hearing date.

The plaintiff, in her testimony in court denied that civil suit 013 of 2000 was ever before the LC1 court of Kibumbiro zone. She denied that she had ever been summoned to appear before the LCI court.

Mr. Bagandawa, learned counsel for the plaintiff, argued that the issues between plaintiff and the first and second defendants have never been heard and determined by the LCI court of Kibumbiro zone. He argued that if this court found that the case was ever before the LCI court of Kibumbiro zone, then it should find that the present case was not barred by the doctrine of res judicata on account of the fact that the former case was not heard and determined on its merits because the case was heard ex-parte.

I heard the evidence of the plaintiff herself on this matter. I also heard and I have examined the evidence of DW3 and DW4. That is the General Secretary and the Chairperson, LCI, of Kibumbiro zone. I do not believe the evidence of the plaintiff that she was never summoned to the LCI court in relation to the case that was filed against her by defendants Nos.1 and 2. The plaintiff lied to this court when she testified that there was never such a case before that court. On the other hand,
DW3 and DW4 appeared to me to be truthful witnesses. I also believe that exhibit D3 is a genuine judgment of the LCI court and that it was not concocted for the purposes of this trial as learned counsel Mr. Badagawa stated from the bar.

Indeed, the issues of trespass and conversion were adjudicated upon fully by the court. It clearly appears to me that the authority in Nakiredde Vs Hotel International (1987) HCB, 85, which learned Counsel, Mr. Badagawa has cited to support the argument that the merits of the case were never heard and determined has no relevance to the instant case. I do not think that the holding would apply where a defendant refuses to answer summon to file a defence and the court proceeds exparte. For explanation No.4 to the provisions of section 7 of the Civil Procedure Act clearly state that any defence that would have been raised, if a defence had been filed, is presumed to have been in issue. In the instant case, the plaintiff's claim of being a kibanja owner and, therefore, not a trespasser would be deemed to have been in issue and fully determined by the LCI court if that court was a court of competent jurisdiction to try and determine the case in question.

By raising the issue of trespass to her kibanja which kibanja the LCI court found, in Civil Suit No.013 of 2000, that the plaintiff never held, the plaintiff would be attempting to bring before this court in another way in the form of a new cause of action a transaction which had already been presented before a court of competent jurisdiction in earlier proceedings and duly adjudicated upon. Ssemakula vs. Susan Magala and 2 Others (1979) HCB 90. In that case, the case against both defendants would be barred by res judicata.

Be that as it may, it appears to me that the more important aspect of this analysis is to answer the question whether the LCI court of Kibumbiro zone was a court of competent jurisdiction in the former suit.

Mr. Tibamanya, learned counsel for the defendants, has argued that since the case in the LCI court was based upon claims of trespass and conversion it, therefore, fell under the jurisdiction of the LC courts provided under part 2 of the First Schedule to the Resistance Committees (Judicial Powers) Statue 1988.

I find considerable difficulties to agree with that argument raised by learned counsel. As this court held in Maria Kevina Ssentamu Vs. Kikondo Kyaterekera Growers Cooperative society HCCS NO. 67 of 1995, (reported in (1996) I KALR 160), the term 'trespass' as contained in part 2 of the First Schedule to the Resistance Committees (Judicial Powers) Statute 1988, does not include trespass to land because the kind of land disputes that an LCI court may entertain are specified under the Second Schedule to the same Statute. In other wards, an LCI court can only competently try disputes relating to land held under customary tenure. That included disputes involving trespass to such land. The trespass contemplated under part 2 of the First Schedule to the statute involves other forms of trespass other than to land. Similarly, the term conversion in part 2 of the First Schedule does not apply to land. That term as it appears in part 2 of the First Schedule to the (Statute) does only relate to conversion of property other than land. The only dispute involving conversion of land that an LCI court may competently entertain is one involving conversion of land held under customary law as provided for under Second Schedule 2 to the same statute.

For those reasons, therefore, it appears to me that the LCI court of Kilumbiro zone had no competent jurisdiction to entertain a dispute involving trespass to and conversion of land not held under customary law but registered under the Registration of Titles Act. The entire trial appears to me to have been a nullity on account of lack of competent jurisdiction. An order

made by a court without competent jurisdiction is a nullity. Mubiru And Others Vs. Kayiwa (1979) HCB 212.

It, accordingly, follows that the plaintiff's case against the first and the second defendant is not barred by the doctrine of res judicata. I will proceed to analyse the evidence in relation to the rest of the issues in the case against all four defendants.

Kibanja interest

The second issue is whether the plaintiff has any kibanja interest on the suit property.

The relevant evidence on the plaintiffs side is that of herself as PWI, that of PW4, Elizabeth Nassozi, a sister to the plaintiff, and PW6, Blandina Nakawesa, another sister to the plaintiff I have examined the entire evidence of the three plaintiff's witnesses. I found nothing establishing the kibanja interest claim which is contained in the plaintiff's pleadings. In fact PW4 and PW6 testified in total departure from the plaintiff's pleadings. Their testimony and that of the plaintiff, in cross-examination, was to the effect that after the death of their father, Tanansi Balizzakiwa, in 1927, the clan leaders gave the land at Busega to all the 6 daughters of Balizzakiwa. In other wards the witnesses were saying that all the 6 daughters of Tananzi Balizzakiwa had milo tenure interest in the suit property. That included the plaintiff as well who, in her pleadings had set out a kibanja interest claim in the same land.

It is a well established rule of procedure that a party cannot be allowed by a court to depart from his or her case as set out in the pleadings and adduce evidence to

established a different case which is inconsistent with his or her pleadings. A party to a case is bound by his or her pleadings. Interfreight Forwarders Uganda Ltd Vs. East African development Bank, SCCA No 13 of 1993.

All in all, the plaintiff has not, on the balance of probabilities, proved her claim of owning a kibanja interest in the suit property. On the other hand the first and second defendants have produced exhibit D2, the Succession Register in respect of the estate of Leo Kigozi. They have also produced exhibit P6, the certificate of title in respect of the suit property. Both prove that the two have beneficial and proprietary interests in the suit property. They have produced DW7, Jane Namusoke, who appeared to me to be a most impressive witness. She

was the wife of the late Leo Kigozi. She was present when Leo Kigozi assigned the caretaker role of his house at Busega to the plaintiff who, in 1956, had left marriage and was residing with Leo Kigozi at Kalambi in present day Mpigi District. I am satisfied that DW7's testimony is very credible evidence. Although the first and second defendants are daughters of Leo Kigozi who was husband to DW7, the witness is not the biological mother to any of the defendants. She had no motive for desiring protect their interests as against those of the plaintiff who is also her sister in law. I am, therefore, satisfied that the plaintiffs stay upon the suit property was not one of a kibanja owner but one of a mere caretaker, first for her brother Leo Kigozi and later for the beneficiaries who were the daughters of Leo Kigozi. Her desire to give the land to her own children and grand children has no basis whatever.

Trespass.

As to whether any of the defendants trespassed upon the plaintiff's kibanja, in <u>Sheik Muhammed Lubowa Vs. Kitara Enterprises ltd. (1992) KLR 127,</u> trespass was defined as "entry <u>to land without the consent of the owner"</u> it follows, therefore, that since the plaintiff has failed to establish that she owns any kibanja interest or any other interest, upon the suit property the question whether any of the defendants trespassed upon her kibanja must be answered in the negative. And it is.

Loss or Damage

The next issue is whether the plaintiff suffered any loss or damage.

The plaintiff's case was that he owned three houses which were destroyed by the defendants. She also alleged that the third and fourth defendants destroyed her household properties.

I will start with the three houses allegedly destroyed.

From the evidence of the plaintiff, and that of PW2, Eva Nakakembo and PW5 Kayiwa David, as well as that of the second defendant, DW1, DW3 lsmael Kayondo, the LCI chairperson and DW8 Kakembo Herbert, I remain with no doubt that some structures were destroyed during the eviction of the plaintiff. The plaintiff had ignored the Administrator

General's advice to vacate the suit property from as far back as 1994. The plaintiff's presence on the land was illegal just in the same way as her eviction was since the order for her eviction was issued by a court lacking competent jurisdiction. But even equity cannot come to her aid since she cannot benefit from her own illegal act of trespass.

In order for the plaintiff to establish that she suffered any loss or damage necessitating compensatory relief from this court, the plaintiff had to prove that her presence on the land was not illegal (did not amount to trespass), and that she actually owned the demolished structures. She also had to establish the respective monetary values of the houses and properties constituting the claim. The plaintiff has done none of the three.

In her pleadings, the plaintiff claimed that three houses belonging to her were destroyed. In her testimony, however, she testified that she had constructed only two houses at Busega. She could not recall when she did so. She could not present anything to indicate the value of those structures.

I found tremendous difficulties in believing the evidence of both PW2 Eva Nakakembo as well as PW5, Kayiwa David. Their respective testimonies were exaggerated. None of them appeared to me to deserve safe credibility. According to each of them the destruction of the structures happened on two separate days. That is on 20th and 21st , December, 2001. From their evidence one forms the impression that there were many structures that were destroyed yet only three small structures appear to have been removed. The work involved could be accomplished efficiently within a matter of less than one hour since the witnesses say several men took part in the demolition.

On the other hand, there is the evidence of DW8, Herbert Kakembo, who appeared to me to be a more credible witness than both PW2 and PW5 as well as the plaintiff herself. His evidence was that the plaintiff did not own any structure of her own on the suit property. The three structures that were destroyed were the butchery built in mud and wattle by the late Leo Kigozi, a kitchen structure built by the grand children of the plaintiff and a two roomed block structure built by a daughter of the plaintiff for her own use. The plaintiff was residing in the main house, built by the late Atanansi Balizzakiwa, which was never demolished. I believe the evidence of that witness.

Lastly, what the plaintiff seeks against the first and second defendant in terms of compensation is, in effect, special damages. As a rule, special damages must strictly be pleaded and proved. In both respects, that rule has not been complied with. The plaintiffs claim thus appears to me to be bad in law. Ssali Vs. Bwesigye (1978) HCB 188.

The Plaintiffs case against the third and fourth defendant must equally fail. The claim against them was that they destroyed household properties of the plaintiff which lay outside the demolished structures. The evidence against the two was basically from PW2 Eva Nabokembo and PW5, Kayiwa David. I have already given reasons why I consider the evidence of those two witnesses to be the kind of evidence that could not be safely acted upon. It does not appear to me to be believable that those two witnesses and other relatives of the plaintiff could have left any valuable property of the plaintiff outside the destroyed or half from the 20th to the evening of 21st December 2001 unattended to or placed in safe custody. Indeed, it is equally unbelievable that Mrs. Kibalizi could, for no explained reason, have gone out of her way to go and purchase paraffin in a jerrycan, bring it to a compound where a lot of people had gathered and, in broad day light, set fire to some old woman's

property left lying about in the compound after her house had been demolished. That evidence was clearly the product of the mental creation of, most probably, PW2.

I accept Mrs.Kibalizi's explanation to the effect that she could have annoyed the plaintiff and her witnesses, who are her grandchildren, because she had earlier introduced a prospective purchaser of the suit property to the first defendant. The plaintiff and her witnesses got to know about that fact.

Quite like the case of the demolished structures, the properties claimed to have been destroyed and their respective values have equally not been proved. Even in the pleadings, the claim was merely too generally pleaded.

Reliefs

The last issue is whether the plaintiff deserves the remedies she sought in the plaint. Since all her claims have failed, it is inevitable that she cannot secure any of the remedies which she sought in the plaints. The case is, accordingly, dismissed against all the four defendant with costs.

V.F.MUSOKE-KIBUUKA

(JUDGE)
06/01/2003

Court: Order

This judgment may be delivered by the Deputy Registrar in charge of Civil matters on a day and time fixed by her.

V.F.MUSOKE-KIBUUKA

(JUDGE)
06/01/2003.